Petition

81-1170

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Supreme Court of the United States

OCTOBER TERM, 1981

No.

JOHN R. BERNOTAS, PETITIONER

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA CRIMINAL CASE

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QUESTIONS PRESENTED

1. Whether a State appellate court can hold a federal constitutional error harmless in the absence of its ability to declare a belief that the error is harmless beyond a reasonable doubt?

2. Whether a State appellate court can declare a belief that a federal constitutional error is harmless beyond a reasonable doubt when under the circumstances it is impossible to say that there is no reasonable possibility that the constitutional error of admitting tainted evidence either might have contributed to the conviction or might well have tipped the scales in the jurors' minds in favor of the conviction?

3. Whether a State appellate court's sustaining of the denial of disclosure of a confidential informant who is the only eye witness to alleged criminal activity is violative of the right of cross examination and the right to a fair trial under the Federal constitution?*

*The caption of the case contains the names of all parties.

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Supreme Court of the United States

OCTOBER TERM, 1981

No.

JOHN R. BERNOTAS, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA CRIMINAL CASE

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the Supreme Court of South Carolina, dated and entered in this case on September 29, 1981.

OPINIONS BELOW

The Court of General Sessions for Richland County, South Carolina filed no opinion. The opinion of the Supreme Court of South Carolina (App. 17) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina was dated and entered on September 29, 1981. Petition for rehearing was denied on October 27, 1981 (App. 25). Order staying judgment was dated and issued November 2, 1981. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Laws of South Carolina, 1976, as amended.

Section 44-53-370

(a) Except as authorized by this article it shall be unlawful for any person:

(1) To *** possess with intent to *** distribute *** a controlled substance.

***

(d)(3) Possession of more than ten grains of cocaine *** shall be prima facie guilty of violation of subsection (a) of this section.

STATEMENT OF CASE

Petitioner was indicted by the Grand Jury in the Court of General Sessions of Richland County, South Carolina, charged in a one-count indictment with possession of an unlawful drug, cocaine, with intent to distribute. He was tried, found guilty and sentenced to a term of imprisonment of ten years.

Briefly, the following are the facts pertinent to the petition: On July 14, 1979, pursuant to information given to the police by an informant, the only eye witness to the alleged offense, petitioner was stopped while driving his vehicle, arrested and searched. Two or three grams of co-

caine, which is about four times the amount necessary to raise a presumption of intent to distribute under South Carolina law, was found and taken from his person, together with paraphernalia from the interior of the vehicle, all of which according to the evidence is indicative of possession for personal use.

The police officers then made a search of the trunk of the vehicle and seized therefrom without a warrant one ounce or twenty-eight grams, which is about forty-three times the amount necessary to raise the presumption of intent to distribute under South Carolina law.

A motion to require disclosure of the identity of the alleged confidential informant who was an alleged eye witness to the alleged offense was denied by the trial judge. Motions to suppress made by petitioner were also denied by the trial judge and the case then proceeded to trial.

During the course of the closing arguments by defense counsel to the jury, the solicitor in the presence of the jury, interposing an objection, commented on the failure of petitioner to take the witness stand, inferring that petitioner had a criminal record as appears from the following:

TR, Page 319, Lines 11-14*:

"SOL. HELLER: Objection, Your Honor, the only way that the State could mention at all, question this defendant on any existence of a previous record is that he take the witness stand."

The solicitor, however, knew from the testimony given by the State's witnesses that petitioner had no prior criminal record, as appears from the following:

TR, Page 142, Lines 19-23:

"Q. Lieutenant McNeely, John Bernotas in fact, ac-

*TR refers to Transcript of Record in Court below.

cording to your records and the records of The State, has no arrests or convictions ever before on any charges whatsoever does he?

A. To my knowledge, no, sir."

Motion for mistrial thereupon was made and denied; and although the trial judge attempted to cure the error by instructing the jury to disregard the solicitor's remarks, he failed to include in the instruction that petitioner had no prior criminal record.

Upon a finding of guilty of possession with intent to distribute, petitioner was sentenced to imprisonment for ten years.

Appeal from the conviction, sentence and rulings of the trial judge was duly taken to the Supreme Court of South Carolina in which the issue of a violation of petitioner's constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution was raised on a case and exceptions which included, inter alia, the following exceptions:

TR, Page 372 (Exception 1)

"1. The trial judge committed prejudicial error in denying appellant's motion to suppress and exclude as evidence the items seized from appellant's person and the items seized from a latched metal box found in the trunk of appellant's automobile, said error being that the aforesaid items were obtained as the result of a warrantless arrest without probable cause and a warrantless search and seizure without exigent circumstances in violation of appellant's rights under Amendment 4, United States Constitution, made applicable to the states under Amendment 14, United States Constitution and the provisions of Article 1, Section 10 of the constitution of the State of South Carolina, 1895 as amended."

TR, Page 372 (Exception 2)

"2. The trial judge committed prejudicial error in denying appellant's motion to require the State to disclose the identity of the alleged confidential informant, said error being that it deprived appellant of presenting his defense and his right of cross examination as to crucial issues in violation of his right to a fair trial under the Federal and State Constitutions."

TR, Pages 372, 373 (Exception 3)

"3. The trial judge committed prejudicial error in denying appellant's motion to require the State to disclose the identity of the alleged confidential informant, said error being that the alleged confidential informant was a material witness as to the defense to the alleged offense of possession with intent to distribute."

TR, Page 373 (Exception 6)

"6. The trial judge committed prejudicial error in denying appellant's motion for a mistrial when the Solicitor commented on the failure of appellant to take the stand, said error being that said comment was contrary to law, deprived appellant of a fair trial and violated his constitutional rights under the Federal and State constitutions."

TR, Page 377 (Exception 20)

"20. The trial judge committed prejudicial error in denying appellant's motion for a new trial on the ground of the Solicitor's comment on the failure of appellant to take the stand, said error being that said comment was contrary to law, deprived appellant of a fair trial and violated his constitutional rights under the Federal and State constitutions."

TR, Page 378 (Exception 25)

"25. The trial judge committed prejudicial error in refusing appellant's motion for a new trial, said error being that the combination of errors upon which the excep-

tions hereinabove set forth are made, in combination and separately, deprived appellant of a fair trial and due process of law in violation of his Federal and State constitutional rights."

Upon appeal the Supreme Court of South Carolina affirmed the conviction and sentence. In its opinion the Court below, referring to the cocaine seized from the trunk, stated that it recognized "the search may have been invalid under the recent United States Supreme Court case of *Robbins v. California,* ____ U.S. ____, 101 S. Ct. 2841, 69 L.Ed. 2d 744 (1981), interpreting *Arkansas v. Sanders,* 442 U.S. 733, 99 S. Ct. 2586, 61 L.Ed. 2d 235 (1979).

The Court stated, however, that since the two to three grams of cocaine lawfully seized from the person of petitioner "is roughly three to four times the amount necessary to establish a prima facie case of possession with intent to distribute" under South Carolina law, the cocaine unlawfully seized from the trunk of the vehicle was "merely cumulative", and concluded, "Thus, the error was harmless."

Yet, nowhere in its opinion was there any discussion about whether it is able to declare a belief that the admission of the tainted evidence was harmless beyond a reasonable doubt on the basis that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," as required by *Fahy v. State of Connecticut,* 375 U.S. 85, S. Ct. 229, 11 L.Ed. 2d 171. Nor was there any discussion that without the tainted evidence, the only proof against petitioner of possession with intent to distribute was the meager circumstantial evidence of the presumption arising under South Carolina Law, which presumption lost some, if not all, of its efficacy by the introduction in evidence of the items found in the interior of the vehicle, "paraphernalia" consistent with and in-

dicative of possession with intent for use rather than for distribution. Nor was there any discussion about the comment of the Solicitor on the failure of the petitioner to take the stand.

As to the withholding of the name of the informer, the Court apparently concluded that the particular facts of this case did not warrant disclosure since it was not shown that the informer was a participant. No other explanation as to the Court's reasoning for finding that the particular facts herein did not require disclosure was set forth in the decision.

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accord with the applicable decisions of this Court:** The issues in this case are (1) whether a State appellate Court can hold a federal constitutional error harmless in the absence of its ability to declare a belief that the error is harmless beyond a reasonable doubt; (2) whether a reviewing court can declare a federal constitutional error harmless beyond a reasonable doubt unless there is no reasonable possibility that the error contributed to the conviction; and (3) whether a reviewing court may properly sustain the denial of the disclosure of a confidential informant who is the only eye witness to alleged criminal activity without violating federal constitutional rights.

On the first issue the decision by the Court below is in direct conflict with the holding by this Court that before a constitutional error can be held harmless, a reviewing Court, State or Federal, must be able to declare a belief, not simply that it was harmless, but rather that it was harmless beyond a reasonable doubt.

Fahy v. State of Connecticut, 375 U.S. 85 (1963)
Chapman v. State of California, 368 U.S. 18 (1967)
Harrington v. California, 395 U.S. 250 (1969)
Schneble v. Florida, 405 U.S. 427 (1972)

In each case the Court held that a federal constitutional error cannot be held harmless unless the reviewing Court can declare a belief that such error is harmless beyond a reasonable doubt. In the instant case the Court below acknowledged that the search and seizure from the trunk of petitioner's vehicle of twenty-eight grams of cocaine, which is roughly forty-three times the amount necessary to raise the presumption of intent to distribute under Section 44-53-370, subsections (a)(1) and (d)(3) of Code of Laws of South Carolina, 1976, was invalid; but affirmed the conviction solely on the basis of the meager circumstantial evidence of the presumption of intent to distribute arising from the possession of merely two to three grams of cocaine legally seized from the person of petitioner, which is only about four times the amount necessary to raise the presumption; and in so doing, the Court below overlooked that, in accordance with the instructions to the jury by the trial judge "when evidence as to a fact is introduced the presumption vanishes", the presumption lost some, if not all, of its efficacy by the introduction in evidence of the items found in the interior of the vehicle, paraphernalia consistent with and indicative of possession with intent for use rather than for distribution.

The Court below, nevertheless, found that the error "was harmless." It did not find nor state that the error "was harmless beyond a reasonable doubt" and as petitioner demonstrates below, under the circumstances herein, it would have been impossible for the Court below to declare a belief that the error was harmless beyond a

reasonable doubt in accordance with the standard of appellate review required by the decisions of this Court.

2. **Under the circumstances herein, it is impossible to declare a belief that the constitutional error is harmless beyond a reasonable doubt:** In the instant case the Court below held that the tainted evidence was "merely cumulative." Notwithstanding this holding, under the circumstances herein, it is impossible to declare a belief that the error is harmless beyond a reasonable doubt. The petitioner herein acknowledged guilt of the offense of possession and the central issue for the jury was the question of intent to distribute. The only proof against petitioner other than the large amount of cocaine introduced from the illegal search of the box in the trunk of his automobile was the meager circumstantial evidence of the presumption of intent to distribute arising from the possession of the small amount of cocaine (two to three grams) seized from his person. Even this presumption lost some, if not all, of its efficacy, in light of the introduction of the paraphernalia consistent with and indicative of possession for use rather than for distribution as testified to by the State's witness, Lt. McNeely as follows:

TR, Page 128, Lines 20-25. Testimony of Lt. McNeely.

"Q. Now, all of these things that you found and you have explained to us are consistent with someone who is using cocaine and someone who is in possession of cocaine for the use of cocaine. Now, did you learn that Mr. Bernotas did use Cocaine? Did you learn that?

A. Recently, yes, Sir."

The fact that the presumption lost its efficacy is particularly true in view of these facts and the instructions by the trial judge that "when evidence as to a fact is introduced the presumption against the fact vanishes and the question must be resolved by you, the jury, upon the evidence."

Moreover, it should be noted that even the trial judge concluded that appellant was a serious user, as appears from the Court's comment during sentencing as follows:

TR, Pages 353, Lines 18-22.

"THE COURT: I hate to see you in this predicament but you brought it on yourself. It is a very dangerous drug you are **using**, very dangerous, major problems. Apparently, you have been involved with it for some time, is that correct? (Emphasis added)"

Also, as a special condition, the Court ordered that the Department of Corrections be made aware of the Court's request that appellant received treatment under Title 20 Project for Criminal Correction Institutional Facilities, as follows:

TR, Page 357, Lines 6-10

"THE COURT: A special condition as ordered by the Court is that I want the Department of Corrections and the Director made aware of my request that this defendant receive such treatment as is available under Title 20."

In contrast to this evidence of the two to three grams held to be legally seized from the person of petitioner, which is only roughly four times more than the amount necessary to create the presumption, the tainted evidence of twenty-eight grams is roughly forty-three times the amount necessary to create the presumption of intent to distribute. And, as distinguished from the likelihood that one possessing only two to three grams of cocaine may be only a user of the drug rather than a distributor, such likelihood would be remote in light of the greater amount of twenty-eight grams illegally introduced in evidence.

Thus, when comparing the large amount of the cocaine illegally seized from the trunk of the vehicle with the small amount of cocaine legally seized from the person of the petitioner, it is obvious that a reviewing court is unable

to say that there is no reasonable possibility that the evidence complained of either might have contributed to the conviction or might well have tipped the scales in favor of the conviction of the greater offense of possession with intent to distribute rather than the lesser offense of only possession.

Separate and apart from the foregoing, the comment by the solicitor on the failure of the petitioner to take the stand, inferring that he had a prior criminal record, furnishes additional reason why it is impossible to declare a belief that the federal constitutional error herein is harmless beyond a reasonable doubt.

The true effect of the holding by the Court below would permit illegally obtained evidence to tip the scales in favor of convictions where otherwise meager legal evidence would be insufficient or raise reasonable doubt for rational triers of fact to find guilt beyond a reasonable doubt of the offense charged, and thus would be prejudicial against an accused, in violation of his rights under the constitution.

3. **The denial of the request to disclose the identity of the confidential informer violated petitioner's right to a fair trial:** As to the last issue presented here, the controlling case is *Roviaro v. United States,* 353 U.S. 53 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957) wherein this Court set forth that with respect to where disclosure of a confidential informer is involved there is no fixed rule; rather disclosure must depend upon the particular circumstance of each case.

In the instant case it appears that the alleged confidential informer was a material witness, and in fact the **only** eye witness alleged by the prosecution to be in a position to amplify the prosecution's theory as to distribution as appears from the following statement by the Solicitor:

TR, Page 248, Lines 10-16.

"SOL. HELLER: . . . I am beginning to be faced with right now is Mr. Hammer continuously cross examining The State's witnesses as to the existence of someone who would say that Mr. Bernotas made or that there was some indication of Mr. Bernotas distributing cocaine on that evening. The answer to the question is that there is a confidential informant involved in this matter."

It logically follows that the alleged confidential informer could also have been a strong witness to contradict the prosecution's theory concerning distribution, and for this reason the alleged informer was not only a material witness but also an essential one.

As stated in *Campbell v. State,* 329 S.W. 2d 875 (Tex. 1959):

". . . No one knows what the undisclosed informer if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. It is the deprival of the defendants of the opportunity of producing evidence which **might** result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eye-witness case of the defendant's guilt."

While the South Carolina Supreme Court did cite the *Roviaro* case, the opinion did not explain any reason why disclosure should not be required where the informer is the only eye witness. The opinion simply concluded that the privilege to withhold is generally applicable and no exception should be made since the informer was not shown to

be a participant herein. In view of the fact that the informer was the only eye witness who might possibly explain away the prosecution's theory, it is respectfully submitted that in accordance with the rationale of the above cited cases disclosure must be required in order that the accused be entitled to a full opportunity to defend himself by cross examination, and to a fair trial by full presentation of any defense.

It is therefore respectfully submitted that the Court below by not applying the standard of appellate review required by the decisions of this Court, and failing to require disclosure of the confidential informer in violation of petitioner's federal constitutional rights, deprived petitioner of the rights guaranteed to him under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons this Court should grant the petition for Writ of Certiorari and should reverse the judgment of the Court below.

Respectfully submitted,

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The State of South Carolina
IN THE SUPREME COURT

THE STATE, RESPONDENT,

versus

JOHN R. BERNOTAS, APPELLANT.

APPEAL FROM RICHLAND COUNTY
RALPH KING ANDERSON, JUDGE

Opinion No. 21576
Filed September 29, 1981

AFFIRMED

Howard Hammer and Alvin Hammer, both of Hammer & Bernstein, of Columbia, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorneys General Brian P. Gibbes and Kay G. Crowe and Solicitor James C. Anders, all of Columbia, for respondent.

GREGORY, A.J.: John R. Bernotas was convicted for possession with intent to distribute cocaine and sentenced to imprisonment for a term of ten years. We affirm.

Officers were advised by a confidential informant that a white male approximately 5'10" with curly brown hair was at the Crock Meyer Saloon located on River Drive and had a quantity of cocaine in his possession which he was distributing. The informant further stated

that the subject was driving a 1975 Ford two-door S.C. License MNN 254. He related he had seen the drugs sold and also in the possession of the person described. The officers knew the informant had given accurate information which led to arrests in the past and his previous information had been reliable.

Appellant was stopped, arrested and searched. Cocaine was found on appellant's person and in a fishing tackle box in the trunk of the vehicle.

Appellant first contends that the arrest and attendant search were without probable cause.

We hold this search in this case falls squarely within the limited established by *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959). There was accurate descriptive information given by a known informer which sufficiently corroborated by six police officers' own observations to justify arrest and search. The informant had provided reliable information dealing with the illegal sale of drugs in the recent past. The appellant had the same physical attributes and was driving the identical vehicle described by the informant. The officers personally verified every facet of the information given them except the actual possession of the cocaine.

Since all the information concerning Bernotas' appearance was confirmed by direct observation by the police officers it was then reasonable for them to believe that the information as to Bernotas' possession of narcotics would likewise be accurate. We conclude the officers had probable cause for the arrest and initial search.

Bernotas also contends the trial court erred in admitting evidence seized from the fishing tackle box which was in the trunk of the vehicle.

We recognize the search may have been invalid under the recent United States Supreme Court case of *Robbins v.*

California, ____U.S.____, 101 S.Ct. 2841, 69 L.Ed. 2d 744 (1981), interpreting *Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979).

However, for the error to require reversal, the appellant must be sufficiently prejudiced by it. In *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), the Supreme Court pointed out that "(a) defendant is entitled to a fair trial but not a perfect one." Police uncovered two to three grams of cocaine during their lawful search of appellant's person and the interior of his automobile. This is roughly four times the amount necessary to establish a prima facie case of posssession with intent to distribute under Section 44-53-370, Code of Laws of South Carolina, 1976 (Cum. Supp. 1981). The cocaine seized from the fishing tackle box was merely cumulative to this independent and overwhelming evidence of guilt. See *State v. Blackburn,* 271 S.C. 324, 247 S.E. 2d 334 (1978); *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed. 2d 340 (1972); *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969); *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). Thus, the error was harmless.

Appellant asserts the trial court erred in refusing to require the State to disclose the identity of the confidential informer. We disagree.

Generally, the State is privileged to withhold the names of informers. This privilege is necessary for protecting law enforcement. *State v. Batson,* 261 S.C. 128, 198 S.E. 2d 517 (1973). While this privilege is not absolute, disclosures should only be made when the informer's identity would be relevant to the accused's defense. *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639, 646 (1957), holding the particular facts of each case would determine disclosure or non-disclosure with special con-

sideration given to "...the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors."

Moreover, it was not shown that the informer was a participant. *State v. Batson,* supra; *State v. Gee,* 262 S.C. 373, 380, 204 S.E. 2d 727 (1974); *United States v. Skeens,* 449 F. 2d 1066, 1071 (D.C. 1971).

All remaining exceptions are without merit and are dismissed under Rule 23.

Affirmed.

LEWIS, C.J., LITTLEJOHN, NESS AND HARWELL, J.J., concur.

The State of South Carolina
IN THE SUPREME COURT

THE STATE, RESPONDENT,

versus

JOHN R. BERNOTAS, APPELLANT.

APPEAL FROM RICHLAND COUNTY
THE HONORABLE RALPH KING ANDERSON,
PRESIDING JUDGE

Opinion No. 21576
Filed September 29, 1981

PETITION FOR REHEARING

To the Honorable Chief Justice and Justices of the Supreme Court:

Your petitioner, the appellant, respectfully prays that this Court grant a rehearing of its decision of September 29, 1981, affirming the judgment of conviction, upon the following grounds:

FIRST

The decision of this Court holding that the error of the trial court in admitting evidence of the cocaine seized from the trunk of defendant's vehicle in violation of *Robbins v. California,* ____U.S.____, 101 S.Ct. 2841 "was harmless" apparently overlooked that the standard of appellate review as set forth in *Chapman v. California,* 386 U.S. 18 (1967) requires that before a federal constitutional

error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt.

SECOND

In concluding that the federal constitutional error of admitting the evidence seized from the trunk of defendant's vehicle without a warrant "was harmless", the Court apparently overlooked or disregarded that the cocaine seized from the trunk (one ounce or 28 grams) was about 42 times the amount necessary to raise the presumption of intent to distribute, as distinguished from the three grams of cocaine taken from the person of the defendant which is only 3 to 4 times the amount necessary to raise the presumption of intent to distribute, the possession of which 3 to 4 grams, absent the vast amount of 28 grams unlawfully seized from the trunk, and particularly in connection with the items (mirror, straw and syringe) taken from the seating compartment of the vehicle which are generally possessed by users themselves, is equally or more so consistent merely with possession rather than possession with intent to distribute.

THIRD

In concluding that the federal constitutional error of admitting the evidence seized from the trunk of defendant's vehicle without a warrant "was harmless", this Court apparently overlooked and disregarded that the assistant solicitor, knowing from the testimony presented by the State that defendant had no criminal record, nevertheless in violation of the Fifth Amendment, *Griffin v. California,* 380 U.S. 609 (1965) commented on the failure of defendant to "take the witness stand", inferring that he has a criminal record, as appears from the following colloquy which took place during closing argument in the presence of the jury. (Transcript, Page 319)

(BY MR. HAMMER) . . ."Certainly if he had all of this and was distributing, wouldn't he have had the fruits of his distribution, wouldn't he have had some money, the profit, wouldn't there have been laying a stack of money here in front of you? Do you see any? No. A young man with no previous record. If he had been in this business, certainly don't you think that they would have based on their explanations to us, don't you think that they would have had something? No previous record. No nothing . . .

(BY SOL. HELLER) Objection, Your Honor, the only way that the State could mention at all, question this defendant on any existence of a previous record is that he take the witness stand."

FOURTH

In concluding that the federal constitutional error of admitting the evidence seized from the trunk of defendant's vehicle without a warrant "was harmless", the Court apparently overlooked that it is completely impossible for a reviewing Court to say that the State has demonstrated, beyond a reasonable doubt, that the evidence of the vast amount of cocaine invalidly seized from the trunk of defendant's vehicle alone or in conjunction with the assistant solicitor's comment on the failure of the defendant to "take the witness stand" did not contribute to the conviction and tipped the scales and influenced the jury to find a verdict of the greater offense of intent to distribute rather than merely possession.

Respectfully submitted,

Howard Hammer
Alvin Hammer
of HAMMER AND HAMMER
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I, Mark L. Archer, Attorney at Law, practicing in Columbia, South Carolina, do hereby certify that it is my professional opinion that there is merit in the ground of the petition for rehearing. I am not concerned as counsel in this case.

Respectfully submitted,

MARK L. ARCHER

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

October 27, 1981

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Re: The State v. John R. Bernotas

Gentlemen:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. WOODROW LEWIS, C.J.
s/ BRUCE LITTLEJOHN, A.J.
s/ J.B. NESS, A.J.
s/ GEORGE T. GREGORY, JR., A.J.
s/ DAVID W. HARWELL, A.J."

The remittitur is being sent down today.

Very truly yours,

FRANCES H. SMITH
Clerk

FHS, wh

cc: The Honorable Daniel R. McLeod
The Honorable Brian P. Gibbes
The Honorable Kay G. Crowe
Solicitor James C. Anders

The Supreme Court of South Carolina

THE STATE, RESPONDENT,

versus

JOHN R. BERNOTAS, APPELLANT.

ORDER

Opinion of the Court in the above entitled matter was filed on September 29, 1981; the Petition for Rehearing denied on October 27, 1981 and the remittitur mailed to the Clerk of the lower court on that day.

On Motion of attorneys for appellant, who intend to petition the United States Supreme Court for a Writ of Certiorari and pursuant to the provisions of Rule 28 of the Rules of Practice, the judgment of this Court shall be stayed for a period of sixty (60) days and thereafter until final disposition is made by that Court.

IT IS SO ORDERED.

J. Woodrow Lewis, C.J.
FOR THE COURT

Columbia, South Carolina
November 2, 1981

CERTIFIED TRUE COPY

REBA D. MIMS
Deputy Clerk, S.C. Supreme Court

Opposition

81-1170

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

JOHN R. BERNOTAS, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Is the South Carolina Supreme Court's decision in accord with the applicable decisions of this Court?

II.

Did the trial court exercise sound discretion in denying Petitioner's motion to require the State to disclose the identity of a confidential informant?

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CASES INVOLVED

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IN THE

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21576, filed September 29, 1981, as reproduced in Petitioner's Appendix at pages 17-20.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Is the South Carolina Supreme Court's decision in accord with the applicable decisions of this Court?

II.

Did the trial court exercise sound discretion in denying Petitioner's motion to require the State to disclose the identity of a confidential informant?

ARGUMENT

I.

The South Carolina Supreme Court's decision is, in fact, in accord with the applicable decisions of this Court.

Petitioner contends that the opinion of the South Carolina Supreme Court is not in compliance with decisions of this Court requiring that error of federal constitutional dimensions must have been harmless beyond a reasonable doubt. Respondent respectfully

submits that this contention is without merit.

In fact, while recognizing that the search may have been invalid under the recent United States Supreme Court case of Robbins v. California, ___ U.S. ___, 101 S. Ct. 2841, 69 L. Ed. 2d 744 (1981), interpretating Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), it unequivocally held that the cocaine seized from the fishing tackle box was merely cumulative to independent and overwhelming evidence of guilt so as to render the error harmless. Respondent contends that no reasonable interpretation of the Court's opinion can be of any effect other than that it found the error to be harmless beyond a reasonable doubt.

II.

Did the trial judge exercise sound discretion in denying Petitioner's motion to require the State to disclose the identity of a confidential informant.

Petitioner claims that the trial court erred in refusing to require the State to reveal the identity of a reliable confidential informant who informed law enforcement officers that Petitioner was in the possession of and distributing cocaine in a night club. This information led to that night club being placed under surveillance and to Petitioner's subsequent arrest with a large quantity of highly concentrated cocaine in his possession. Petitioner attempts to justify his contention by claiming that the confidential informant, was a material witness, perhaps a participant and in fact the only eye-witness who was in a position to amplify the prosecution's theory as to distribution. Respondent respectfully submits that Petitioner's entirely speculative contention failed to satisfy his undisputed burden to demonstrate a due process need for disclosure of the identity of a confidential informant.

There is no dispute that the State ordinarily is privileged to withhold the names of informers. This privilege is based upon a public policy of protecting law enforcement, and a realization that effective law enforcement is impossible without the use of informers. State v. Batson, 261 S.C. 128, 198 S.E. 2d 517 (1973). Respondent readily recognizes that this privilege is not absolute, and that disclosure should be made when the informer's identity would be relevant and helpful to the accused's defense. However, there should be a balancing of the public interest in effective law enforcement and the accused's right to prepare a defense. Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). The Court held in Roviaro that the particular facts of each case would determine when disclosure or non-disclosure is proper with special consideration given to "...the crime

charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors."

Likewise, the South Carolina Supreme Court in Batson set out three prerequisites which must be met by the accused before disclosure can be compelled. First, he must show facts giving rise to an exception. Secondly, there must be a timely request for disclosure. Thirdly, the accused, on appeal, must show that he suffered prejudice from the non-disclosure. To prevail, Petitioner must show that he met all of the above prerequisites. Respondent contends that although Petitioner made a timely request for disclosure, he made no showing of facts sufficient to compel disclosure and has failed to show prejudice from the non-disclosure.

In determining whether disclosure is required, the courts have placed emphasis on the nature of the informer's activities:

> Some courts are of the view that the mere showing that the informer was either a participant and/or a material witness is sufficient to require disclosure since in the absence of an opportunity to interview the informer, the accused has no way of knowing whether the informer would corroborate or contradict incriminating evidence offered by the prosecution. Where, however, the informant is a witness, but not an active participant, there is authority for the proposition that any possible benefit to the accused is purely conjectural, while the loss to society in its efforts to cope with crime is real and substantial, so that disclosure should be refused. Batson, supra.

The South Carolina Supreme Court further held that "[t]he disclosure of one who is merely an informer and not a participant nor a material witness is not generally required."

Respondent respectfully submits that absolutely no showing has been made that the informant was anything but that, a mere informant. In fact, at the time of Petitioner's arrest for possession with intent to distribute cocaine, the only

material witness to that crime was in the automobile with him and her identity well known to him. Petitioner was not charged with distribution of cocaine, but with possession with intent to distribute cocaine. That crime was being committed when he was arrested after leaving the night club where the confidential informant first saw him in possession of it. The informant was therefore neither a participant or a material witness in the crime being committed at the point Appellant was stopped in his automobile and arrested. In essence, Petitioner's indictment and conviction did not hinge on any transaction involving the informant.

Petitioner cites Roviaro for the proposition that the informant's identity should be disclosed. However, the instant case is factually distinguishable from Roviaro, where the petitioner was convicted for transportation and sale of

an unlawfully imported drug to "John Doe", a government informer, There the Court held that disclosure of the informant's identity was necessary since (1) the informer had taken a material part in bringing about the possession of the drug by the petitioner, was the sole participant, together with the petitioner, in the transaction charged, and was the only witness in a position to amplify or contradict the testimony of the government witness; and (2) it was evident from the face of the indictment charging petitioner with a sale of heroin to John Doe that the informer was a participant in and a material witness to the sale. Respondent contends that Appellant, through his speculative assertion, has simply failed to justify required disclosure of the identity of the confidential informant who did no more than alert law enforcement to Petitioner's ongoing crime of possession with intent to distribute cocaine.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

Petitioner's Reply Brief

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1170

JOHN R. BERNOTAS, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of South Carolina

REPLY BRIEF FOR PETITIONER

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Point I: Page

Contrary to Respondent's argument in its brief, the South Carolina Supreme Court neither stated that the error was harmless beyond a reasonable doubt, nor was it able to find from the evidence of record that the error was harmless beyond a reasonable doubt. 1

Point II:

Contrary to Respondent's argument in its brief, the facts in this case required the disclosure of the identity of the confidential informant. 3

SUPREME COURT OF THE UNITED STATES

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The Supreme Court of South Carolina

REPLY BRIEF OF PETITIONER

POINT I

CONTRARY TO RESPONDENT'S ARGUMENT IN ITS BRIEF, THE SOUTH CAROLINA SUPREME COURT NEITHER STATED THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT, NOR WAS IT ABLE TO FIND FROM THE EVIDENCE OF RECORD THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

In its brief at Page 2, Respondent contends

that "no reasonable interpretation of the Court's opinion can be of any effect other than it found the error to be harmless beyond a reasonable doubt." However, Respondent fails to set forth any reasons for this contention which is without merit. If the South Carolina Supreme Court found the error to be harmless beyond a reasonable doubt, it easily could have so stated instead of stating merely that "the error was harmless."

Moreover, it is significant to note that Respondent in its brief did neither address nor treat the crucial issue of whether the South Carolina Supreme Court was able to declare a belief beyond a reasonable doubt that the vastly larger quantity of the drug seized from the trunk and erroneously admitted in evidence could not possibly have had any influence whatsoever upon the jury's

verdict finding the Petitioner guilty of intent to distribute rather than mere possession. This issue was treated by Petitioner in the Petition for a Writ of Certiorari without challenge by Respondent and accordingly it is not deemed necessary to further belabor the point in support of the granting of the Writ.

POINT II

CONTRARY TO RESPONDENT'S ARGUMENT IN ITS BRIEF, THE FACTS IN THIS CASE REQUIRED THE DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

As to the disclosure of the identity of the confidential informant, Petitioner would reiterate that the informer was the only witness as to distribution. If, as stated by Respondent on Pages 6 and 7 of its brief that "In fact, at the time of Petitioner's arrest for possession with intent to distribute cocaine, the only material

witness to that crime was in the automobile with him and her identity well known to him," then, of course, there was no proof of any crime as her testimony at trial was that she never saw Petitioner distribute any cocaine nor did her testimony reveal any evidence of intent to distribute. Her testimony was as follows:

TR, Page 261, Line 4 through TR, Page 262, Line 10:

"Q. And, Miss Daniels, you had testified that you and John Bernotas were at the same club, Crock Meyer's I believe you said?

A. Yes.

Q. I want you to tell the jurors whether you saw John Bernotas distributing any cocaine that night?

A. I did not.

Q. I want you to tell the jurors whether you saw any evidence that he had any of this

cocaine with the intent to distribute it?

A. No, I did not.

Q. Thank you.

THE COURT: Anything further?

SOL. HELLER: Yes, Your Honor.

REDIRECT EXAMINATION BY SOL. HELLER:

Q. Miss Daniels, do you know whether or not John Bernotas intended to distribute this cocaine?

A. No because I didn't know he had it.

Q. And how many times in Crock Meyer's did you see him that night?

A. At the most twice.

Q. And did you see John Bernotas talking to anyone in particular?

A. No, I didn't.

Q. Did you see him go outside?

A. No.

Q. Who were you sitting with?

A. With three friends of mine.

Q. And you were having drinks with them?

A. Yes.

Q. Were you concerned at all with Mr. Bernotas' behavior?

A. No, I wasn't."

The only information which the Respondent claims to have received concerning whether Petitioner was distributing cocaine in a night club came from the confidential informer, as appears from the Solicitor's statement as follows:

TR, Page 248, Lines 10-16.

"SOL. HELLER: . . . I am beginning to be faced with right now is Mr. Hammer continuously cross examining The State's witnesses as to the existence of someone who would say that Mr. Bernotas made or that there was some indication of Mr. Bernotas distributing cocaine on that evening. The answer to the question is that there is a confidential informant involved

in this matter."

Thus, as pointed out in the Petition for a Writ of Certiorari, the confidential informer was not only a material but also an essential witness, who, if identified and produced, might have contradicted or explained away the prosecution's case against the Petitioner. By the Respondent's failure to disclose and identify the confidential informer, the Petitioner was deprived of the opportunity to provide evidence in his defense.

CONCLUSION

For the foregoing reasons and for those stated in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and the judgment of the

Court below should be reversed.

Respectfully submitted,

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